Supreme Court of the United States

OCTOBER TERM, 1966.

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No. 898

W. H. YATES, and JOHN W. GARY,
Petitioners,

versus

HERBERT H. HODGES and FRANCES A. HODGES,
Respondents.

BRIEF OF RESPONDENTS AGAINST PETITION FOR WRIT OF CERTIORARI.

THREADGILL & HICKS,
TAYLOR B. SMITH,
W. H. JOLLY,
213 North 5th Street,
Columbus, Mississippi.

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STATEMENT OF FACTS.

The Respondents herein filed their Bill of Complaint in the Chancery Court of Hinds County, Mississippi, against W. H. Yates and John W. Gary, the Petitioners herein, and also against a co-defendant, State Stove Manufacturing Company. A true copy of the Bill of Complaint is printed in the Appendix hereto at page 9.

All the defendants filed their answers. We deem it necessary, however, to an understanding of the issues presently before this Court to print only the answer

of State Stove Manufacturing Company which is shown in the Appendix hereto at page 19.

On appeal, the Supreme Court of Mississippi rendered Judgment against Petitioners.

Counsel for Petitioners seek a review by this Court of this case for the reason that the Bill of Complaint charges the Petitioners, herein, with negligence in installing a pressure relief valve in the cold water line of a water heater rather than the hot water line, whereas at the trial of the case it was proved by State Stove Manufacturing Company, the other defendant, that Petitioners herein were negligent in that they failed to follow the instructions of State Stove Manufacturing Company in the installation of the proper relief valve for the heater.

This question was fully briefed by all the parties when the case was pending before the Supreme Court of Mississippi. That court in a unanimous holding, decided the issue against Petitioners.

The Respondents take the position that this issue was purely procedural in the trial court and the Supreme Court of the State of Mississippi and that Petitioners were denied no substantive rights. Further that no federal question is involved.

The Respondents deny that the judgment of the Supreme Court of Mississippi constitutes a denial of rights guaranteed to Petitioners by the due process clause of the Fourteenth Amendment to the Constitu-

tion of the United States for the reasons hereinafter presented:

POINT ONE. The Petitioners, Defendants Below, Were Not Surprised By The Proof That They Negligently Installed The Hot Water Heater And That They Failed To Follow The Instructions Of The Manufacturer.

The answer of the State Stove Manufacturing Company was filed in the trial court many months prior to the hearing. In the answer of the manufacturer of the heater, in paragraph 8 (a) they charged the Petitioners with such negligence. This negligence was admitted by Pittman, the agent and employee of the Petitioners herein, and the man who installed the hot water heater for them. This is shown in the opinion of the Supreme Court of the State of Mississippi at page 44 of the Appendix to Petitioners' Petition for Writ of Certiorari.

This information was solely known to Petitioners and their agent and it was impossible for Respondents to allege it in the Bill of Complaint.

This negligence on the part of Petitioners, admitted by their agent and employee, was before the court. As stated, it was proved by the admission of Petitioners' agent and pursuant to the allegations of paragraph 8 (a) of the answer of State Stove Manufacturing Company hereinbefore mentioned.

Judge Virgil A. Griffith, a long time Chancery Judge and Supreme Court Judge in the State of Mississippi wrote a handbook on Mississippi Chancery practice in 1925. This book has been the guide of the bench and bar of the State since said date. This work was cited by the Supreme Court of Mississippi in opinion, set out on page 48 in the Appendix to Petitioners' Petition for Writ of Certiorari. Section 186 of Judge Griffith's work, referred to by the Mississippi Supreme Court, is printed herein in the Appendix at page 23.

We assert that the proof of negligence against Petitioners although not set out in the Bill of Complaint but set out in the affirmative answer of a co-defendant was clearly before the Court under the purview of said section. Neither the trial court or the Mississippi Supreme Court could ignore this evidence.

The cases cited by counsel for Petitioners are not applicable to the case at bar. We are not faced with a question of something being proved that was not alleged. It was alleged by the co-defendant of the Petitioners and they had clear notice of it and their co-defendant proved their negligence by their own agent and employee.

We therefore urge that no federal question is involved and this Court has no jurisdiction to hear the cause on its merits.

POINT TWO. If This Court Had Jurisdiction Of This Cause Under Some Other Ground And Decided Same On The Merits, The Decision Would Of Necessity, Be Against Petitioners On The Issue Raised In Their Petition Herein, Under The Federal Rules Of Civil Procedure.

For the convenience of the Court, Rule 15 (b) reads as follows:

"Rule 15 (b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

The following annotations of decisions under said rule as shown by Volume 1A Barron and Holtzoff, Federal Practice and Procedure follows:

The case of *Mitchell v. Wright,* C.C.A. 9th, 1946, 154 F.2d 924, holds:

> "An objection in the appellate court which would dispose of a cause upon a technicality in pleading is not to be favored in view of Rules 8 (f) and 15, especially where if the objection had been made below, the plaintiff might have amended his complaint so as to obviate the objection."

The case of *Hart v. Knox County,* D.C. Tenn. 1948, 79 F.Supp. 654, appeal dismissed 171 F.2d 45, holds as follows:

> "Prime purpose of Rule 15 (b) is to avoid necessity of new trials because of procedural irregularities, not to set judgments aside and make new trials necessary."

The case of *U. S. v. Kesinger,* C.A.10th, 1951, 190 F.2d 529, holds as follows:

> "Plaintiff entitled to benefit of defendant's evidence."

The case of *El Paso Elec. Co. v. Surrency,* C.A.N.M, 1948, 169 F.2d 444, holds as follows:

> "Evidence as to negligent operation of defendant's truck, which defendant adduced on direct

examination of its own witness and did not move to strike out, was properly considered in action for injuries sustained in collision with truck, though complaint predicated cause of action on negligence in continuing to operate truck in mechanically dangerous condition without alleging any negligence in operation thereof."

The case of *Globe Liquor Co. v. San Roman,* C.C.A. 7th, 1947, 160 F.2d 800, holds:

"Where at trial evidence is admitted without objection which proves a case different from that alleged in complaint, pleadings may be considered amended to conform to the evidence thus introduced."

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
THREADGILL & HICKS,
TAYLOR B. SMITH,
W. H. JOLLY,

By W. H. JOLLY,
213 North 5th Street,
Columbus, Mississippi,
Attorneys for Respondents.

CERTIFICATE OF SERVICE.

I, W. H. Jolly, attorney for Respondents herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the date shown below, I served the foregoing Brief for the Respondents upon W. H. Yates and John W. Gary, Petitioners, by mailing a true copy thereof to Honorable Malcolm B. Montgomery, attorney of record for Petitioners, addressed to him at P. O. Box 1288, Jackson, Mississippi, postage prepaid, first class mail.

WITNESS my signature this 19 day of January, 1967.

W. H. JOLLY,
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